Filed 11/9/09 In re A.R. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.R., a Person Coming Under the Juvenile Court Law.	B214137 (Los Angeles County Super. Ct. No. CK 74194)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.R., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Valerie Skeba, Referee. Affirmed with directions.

Anne E. Fragasso, under appointment by the Court of Appeal, for Defendant and Appellant.

Robert E. Kalunian, Acting County Counsel, James M. Owens, Assistant County Counsel, and Melinda S. White-Svec, Deputy County Counsel, for Plaintiff and Respondent.

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Father J.R. appeals from the jurisdictional and dispositional orders issued by the juvenile court on February 4, 2009, as to his infant son, A.R. Father contends the juvenile court failed to advise him of his trial rights and such error mandates reversal. Respondent the Los Angeles County Department of Children and Family Services (Department) contends the failure to give father the standard advisements constituted harmless error and provides no ground for reversal. We agree with the Department and find any error to be harmless. We thus affirm the orders with a direction to the juvenile court to correct a clerical error.

FACTS AND PROCEDURAL HISTORY

The minor was detained in November 2008 upon allegations including that mother and father had a history of domestic violence committed in the presence of the minor's three-year-old half-sibling; father struck and pushed mother when she was three months pregnant with the minor; the parents possessed illicit drugs and drug pipes in the sibling's home within reach of the sibling; baggies of cocaine and methamphetamine were in months past found in father's possession; father had a history of substance abuse and was a current user of illicit drugs; and father was incapable of providing regular care and supervision for the child.

The Department's detention report reflected that the Department had filed a dependency petition for the minor's sibling in September 2008, alleging general neglect and mother's incapacity to care for the sibling. The detention report in the sibling's case disclosed that father had been arrested for possession of 18 baggies of rock cocaine and methamphetamine for sales in August 2008. He was arrested a second time in August 2008 for possession of a controlled substance, after police officers found him passed out in his car and recovered from within it 23 baggies of rock cocaine and methamphetamine. Mother was then pregnant with the minor.

The detention report for the minor indicated the child was detained about a week after his birth. Mother claimed father no longer lived with the family and saw the minor only once when he went to the hospital to sign the birth certificate. Mother indicated that although father intended to support the minor financially, she no longer had any

relationship with father and did not plan to reconcile with him. Mother said she had not known father was dealing drugs. Mother had once found a pipe in his apartment before moving in with him. She asked father if he used drugs, and he denied it. On another occasion, mother found a small plastic bag containing a white salt-like substance in father's pocket. When mother questioned him, father denied he used drugs and said people used the white substance "to stay awake and not sleep." Mother was not familiar with drugs and did not know what the substance was. The worker reported that mother said she suspected father used drugs from these incidents. However, mother stated she never saw father use drugs in the home and never saw him under the influence.

The detention report also indicated that mother denied that father had ever physically assaulted her. She said when she was about three months pregnant, she had attempted to block the door to prevent father from leaving for work and they got into an argument. She stated that father pushed her aside and raised his hand at her, but he did not hit her. The neighbors called the police, who left without taking action.

The social worker reported that father denied using or selling drugs. Father claimed he was falsely charged in a pending case with possession of a controlled substance. Prior to that, he was pulled over by a police officer after picking up a client in his taxicab and was arrested after the client was found to have drugs in his possession.

According to the detention report, father indicated he was innocent of all charges but was willing to cooperate with the Department so that the minor could remain in mother's care. He had no plans to have contact with mother or the child until he resolved his criminal case. Father asked for an "on demand" drug test and tested negative. Father also denied any domestic violence. He admitted having a verbal argument with mother after she became upset over his working long hours and tried to prevent him from leaving for work. He denied ever hitting or attempting to hit her.

Both parents attended the detention hearing on November 17, 2008, and were appointed counsel. After eliciting the parents' addresses and other information, the court asked counsel for the parents, "On behalf of your client, waive further reading of the petition, statement of rights?" Mother's counsel stated, "On behalf of the mother, so

waived, enter a general denial." Father's counsel responded, "On behalf of father, waive reading of the petition, enter a general denial."

The court stated it was inclined to detain the child and asked, "Does anybody wish to be heard?" Mother's counsel submitted after confirming the child would be detained in mother's home. Father's counsel submitted to the Department's recommendation of "home-of-parent mother."

The court found a prima facie case for detaining the child and for removing him from father's custody. It set the matter for a pretrial resolution conference to take place on December 18, 2008.

A disposition report for the December 18, 2008 hearing essentially confirmed and augmented the facts in the detention report. Mother had decided to have no further contact with father, and father was providing money to support the minor. The social worker found no evidence to suggest father currently lived in the home. Although the court had granted him monitored visits, father had not asked to visit nor visited the minor.

Father and mother appeared before the court on December 18, 2008, and the juvenile court set the minor's adjudication hearing for February 4, 2009. Father's counsel then asked to be heard and stated, "I would like to have the . . . Court order the social worker to test father. His one test so far has been negative. I'd like him to test weekly until we return." The court therefore ordered random drug tests for father and directed the Department to arrange for visitation between father and the child.

At the December 2008 hearing, mother submitted on the social worker reports as to her other child. In father's presence, the juvenile court orally advised mother of her rights: to a court trial at the adjudication hearing, to assert the privilege against self-incrimination, to confront and cross-examine witnesses, to subpoena witnesses and to present a defense. The court sustained amended allegations as to the minor's sibling and dismissed certain allegations without prejudice. Mother was ordered to complete her programs and the minor's sibling was ordered released to mother's care upon verification of child care.

The contested adjudication for the minor went forward on February 4, 2009, with both parents present. A last minute information for the court indicated father was paying child support. As yet, he had not asked to visit the minor nor visited the minor. Father advised the social worker he would contact her once he was ready to visit. The social worker had referred father for random drug tests on January 30, and thus far he had no missed or dirty test. The worker was in the process of arranging for the court-ordered weekly drug tests.

At the adjudication hearing, the court took judicial notice of the prior sustained petition, accepted a written waiver of rights from mother and admitted into evidence the detention and disposition reports. The court found true by a preponderance of evidence amended allegations that the parents had a history of domestic violence; on prior occasions father had struck and pushed mother in the presence of the minor's sibling; and father had a history of substance abuse and was a current user of illicit drugs, which rendered him incapable of providing regular care and supervision of the minor. The court dismissed allegations that mother struck the father, that the parents had possessed illicit drugs and drug pipes in the home within the sibling's reach, and that on two prior occasions father was found to have cocaine and methamphetamine in his vehicle endangering the sibling.

Father's counsel told the juvenile court the parties were unable to agree on a case plan. Counsel argued that the court should order father to attend a parenting class and a domestic violence class, but not a substance abuse program unless he tested dirty. She indicated father was willing to test for at least three months and to submit to a program if he had a dirty test. She also asked the court to allow father to take a free parenting class offered by the Baldwin Park School District (Baldwin Park).

The Department argued father should be required to attend a substance abuse program because it was believed he had a serious drug problem. He had several arrests in which large amounts of drugs were found in his possession and, on one occasion, was found passed out in his car. The Department's counsel argued that the original detention

report on the child's sibling indicated mother knew father was using drugs for "quite a while" before they got together.

The juvenile court declared the minor to be a dependent of the court under Welfare and Institutions Code section 300 (section 300), subdivisions (b) and (j). As to father, the court found by clear and convincing evidence that there was a substantial danger to the minor's physical and emotional health and safety from father's conduct and there was no reasonable means to protect the child without removal from father's custody. The court ordered father to take parenting classes, indicating it would permit father to take the class at Baldwin Park, to undertake individual counseling or domestic violence counseling, and to attend a weekly drug rehabilitation program with random testing or Alcoholics Anonymous at least three times a week. If father tested dirty, he was ordered to undergo a more structured program.

Father timely appealed from the jurisdictional and dispositional orders.

DISCUSSION

1. Advisement of Rights

Although civil in nature and designed to protect the child rather than to prosecute the parent, dependency proceedings implicate the fundamental right of parents to care for and have custody of their children. Those rights, therefore, may not be interfered with without due process of law. (*In re Monique T.* (1992) 2 Cal.App.4th 1372, 1376-1377 (*Monique T.*); see also Rules of Court, rules 5.534(k)(1), 5.682(b).)[1] Rule 5.534(k)(1) provides that the court must advise the parent of the right (1) to assert the privilege against self-incrimination; (2) to confront and cross-examine the persons who prepared reports or documents submitted to the court and witnesses called to testify against the parent; (3) to use the process of the court to bring in witnesses; and (4) to present evidence to the court. Rule 5.682(b) requires the court in a jurisdictional proceeding to advise the parent of the right (1) to a hearing on the issues raised by the petition; (2) to assert the privilege against self-incrimination; (3) to confront and to cross-examine all

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[1] All further rule references are to the California Rules of Court.

witnesses called to testify against the parent; (4) to use the court process to compel attendance of witnesses on the parent's behalf; and (5) to have a removed child returned to the parent within two working days after a finding by the court that the child does not come within the jurisdiction of the juvenile court under section 300, unless the parent and the social agency agree that the child will be released on a later date.

Before the parent admits any allegations, "the court must first find and state on the record that it is satisfied that the parent . . . understands the nature of the allegations and the direct consequences of the admission, and understands and waives the rights in [rule 5.682(b)]." (Rule 5.682(c).) When a parent admits the allegations of the petition, pleads no contest, or submits to the jurisdictional determination of the court based on the information provided to the court and waives any further jurisdiction hearing, the "*Waiver of Rights--Juvenile Dependency* (form JV-190) may be completed by the parent . . . and counsel and submitted to the court." (Rule 5.682(d), (e).) After the admission, plea of no contest, or submission, the court must make findings, which include that "[t]he parent . . . has knowingly and intelligently waived the right to a trial on the issues by the court, the right to assert the privilege against self-incrimination, and the right to confront and to cross-examine adverse witnesses and to use the process of the court to compel the attendance of witnesses on the parent or guardian's behalf," and that the admission, no contest plea or submission by the parent "is freely and voluntarily made . . . ." (Rule 5.682(f)(3), (5).) Even given such requirements, no due process violation occurs if the "'record affirmatively shows'" that the waiver of rights is "'voluntary and intelligent under the totality of the circumstances.'" (*In re Patricia T.* (2001) 91 Cal.App.4th 400, 404-405.)

In the present case, the record shows the juvenile court did not make the advisements required by rules 5.534(k)(1) and 5.682. At the detention hearing, the court accepted, through counsel, father's waiver of the reading of the petition, advice of rights and explanation of the proceedings. Subsequently, at the jurisdiction hearing, father's counsel submitted the matter for determination after the court took judicial notice of the prior sustained petition and admitted the detention and disposition reports into evidence.

The record does not reflect the court advised father of his rights before accepting counsel's submission. The record does not include any written waiver of rights by father, nor has the Department pointed us to any affirmative showing father's submission was voluntary and intelligent under the totality of the circumstances.

The Department argues that due process was satisfied by its service of a written "Notice of Hearing on Petition" for the jurisdiction and disposition hearing. This notice contained an advisement of the following rights and circumstances: to be present at the hearing and to present evidence; to be informed that the court may receive evidence and determine whether the allegations are true; if the allegations were found true, the court could declare the minor a dependent, remove custody of the minor from the parents, and make orders regarding placement, visitation and services. Be that as it may, the Department concedes the juvenile court did not advise father of his constitutional rights when receiving the submission, and it implicitly acknowledges the failure to do so was error. We thus conclude the court's failure to give father proper advisements constitutes error.

However, any error in failing to give the advisement of rights is subject to the harmless error standard. (*Monique T., supra*, 2 Cal.App.4th at pp. 1377-1378 [finding error harmless regardless of whether strict standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), or reasonable probability test of *People v. Watson* (1956) 46 Cal.2d 818 applies].)

In a comparable context, our Supreme Court has stated: "The California Constitution prohibits a court from setting aside a judgment unless the error has resulted in a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) We have interpreted that language as permitting reversal only if the reviewing court finds it reasonably probable the result would have been more favorable to the appealing party but for the error. (*People v. Watson*[, *supra*,] 46 Cal.2d [at p.] 836.)" (*In re Celine R.* (2003) 31 Cal.4th 45, 60 [court should set aside judgment due to error in not appointing separate counsel for separate siblings only if it finds reasonable probability outcome would have been different but for error]; see also *In re James F.* (2008) 42 Cal.4th 901, 911, fn. 1, 917

(*James F.*) [error in process of appointing guardian ad litem for parent is subject to a harmless error analysis, but court declines to decide whether the appropriate standard is "harmless by clear and convincing evidence" or "harmless beyond a reasonable doubt"].) In any case, the Supreme Court stated that "[w]e cannot agree . . . that prejudice is irrelevant in a dependency proceeding when the welfare of the child is at issue and delay in resolution of the proceeding is inherently prejudicial to the child." (*James F.*, at p. 917.) Therefore, such error, if any has occurred, is subject to analysis for harmless error rather than an automatic reversal.[2]

The thrust of the Department's argument is that any error was harmless in that (1) father was represented by counsel at every hearing; (2) father received written notice of the hearing from the Department containing an advisement of his rights "nearly identical" to the advisement of rights required to be given in rules 5.534 and 5.682; (3) father requested a contested hearing; (4) father and his counsel stood silently by while the court received the Department's social study reports into evidence and then sustained the section 300 petition with amendments; (5) father has not shown he would have received a more favorable outcome had the court given him the standard advisement of rights in court; and (6) the jurisdictional facts were proved through admission of the social worker reports and the social study reports, together with the incorporated police reports, which provide overwhelming evidence of each sustained allegation.

We agree the record discloses substantial evidence to support each of the court's findings and therefore any failure to advise father of his rights was harmless. We further note that the juvenile court orally advised mother of her rights and also accepted a written waiver of rights from mother in father's presence, so father could not have been ignorant of the rights granted to parents.

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[2] As in *James F.*, the parties have not discussed nor briefed whether the appropriate standard is "harmless by clear and convincing evidence" or "harmless beyond a reasonable doubt," and we do not decide this question because we conclude the error at hand was harmless even under the more stringent *Chapman* standard. (*Monique T., supra,* 2 Cal.App.4th at pp. 1377-1378.)

Father's briefs fail to indicate what he would have done differently had the juvenile court given him the appropriate advisements. He names no witnesses he would have called, identifies no testimony he would have given and asserts no areas of cross-examination he would have pursued had the advisements been given. He does not specify what negative information he would have rebutted or contested had the court advised him of his rights. There was no indication father desired, contrary to his counsel's indication, a contested hearing or that he disagreed with submission of the case upon the social worker reports, nor was there any indication father desired a continuance to marshal facts to rebut the allegations of the petition. We additionally note that father was granted monitored visitation with the minor. Yet, other than a single visit to the hospital to sign the birth certificate, father never visited or asked to visit the minor. Father thus had not made any effort to form a parental bond with the minor, and it is doubtful he ever will, given his lack of interest in the child's welfare.

Any error in failing to give father the standard advisements therefore was harmless.

2. Clerical Error

The clerk's minute order of February 4, 2009, states that "Father may attend *drug counseling* at Baldwin Hills." (Italics added.) Father states this is an error because at the hearing the court granted father's request that he be permitted to attend a free *parenting* class offered by Baldwin Park. Because the minute order inaccurately reflects the court's oral pronouncement, Father requests that the matter be remanded to the trial court with an order to correct the minute order.

The Department concedes that the reporter's transcript reflects that father made a request to take a free parenting class offered by Baldwin Park, with which the court stated it had "no problem," and the minute order inaccurately refers to "drug counseling," rather than a parenting class. However, the Department contends father should properly have filed a request with the juvenile court to change the minute order nunc pro tunc in that a party cannot successfully complain the trial court failed to do something which it was not

asked to do. Appellate courts nevertheless have inherent power to correct clerical errors in the record. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

Conflicts between the reporter's transcript and the clerk's transcript are generally resolved in favor of the reporter's transcript unless the circumstances dictate otherwise. (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 249.) The Department acknowledges this principle, concedes father's request is factually correct and states it does not oppose his request to have the minute order corrected.

Accordingly, we will order the minute order amended to correctly reflect that father is permitted to attend a free parenting class offered by Baldwin Park.

DISPOSITION

The case is remanded to the juvenile court to correct the clerical error in its minute order to reflect that father is permitted to attend a free parenting class offered by the Baldwin Park School District. The orders are otherwise affirmed.

FLIER, J.

We concur:

RUBIN, Acting P. J.

MOHR, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.